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IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM J. KELLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is the holding of the Seventh Circuit that standard instructions on willfulness necessarily encompass an instruction on the defense of reliance on advice of counsel contrary to the opinions of the Supreme Court and contrary to the opinions of the other circuits?

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REASON FOR GRANTING THE WRIT

I. The holding of the Seventh Circuit that standard instructions on willfulness necessarily encompass an instruction on the defense of reliance on advice of counsel is contrary to the opinions of the Supreme Court and contrary to the opinions of the other circuits.

The Brief For The United States In Opposition does not dispute the argument of the petitioner. In footnote 3, the brief in opposition admits that courts of appeals have held that where there is an evidentiary basis for the defense of reliance on advice of counsel, an instruction such as the one proposed by petitioner should be given. The brief in opposition does not cite or discuss in any way the Supreme Court decision of *United States v. Pomponio*, 429 U.S. 10 (1976), which was the basis of the court of appeals decision below. The brief in opposition impliedly admits that the court of appeals decision was in error on the law.

The brief in opposition does not cite or discuss in any way the other decisions of the Supreme Court cited by petitioner which have long established the principle that a defendant is entitled to have the trial court instruct the jury with a proper statement of the law on his theory of defense even though general instructions on "conscious participation" or "willfulness" are given. *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395 (1947); *Bird v. United States*, 180 U.S. 356 (1901).

The Government replaced the legal issue in the petition for certiorari with an issue which argued that the facts of the case did not provide an evidentiary foundation for the giving of the advice of counsel instruction to the jury. The court of appeals did not decide that issue. The court of appeals stated that whether there was a foundation in the evidence to support the defense theory of good faith reliance was "questionable." Pet. App. A-5. The court of appeals reviewed the extensive evidence presented by both sides on the issue. The court of appeals went on to assume that there was evidence to support the defense theory of good faith reliance, and then enunciated the legal principle that "instructions on willfulness necessarily encompassed" an instruction on the defense theory of good faith reliance on the advice of counsel, which statement of the law the Government does not dispute is in error. Pet. App. A-6.

The petition must be granted to correct the erroneous statement of the law and the erroneous application of the law in this case. Whether the judgment is vacated summarily on the basis of the brief in opposition and remanded to the court of appeals or whether the petition is granted and set for further argument is within the discretion of the Court.

If the court hears further argument, it is still within the discretion of the Court to remand the case to the court of appeals to decide the issue which that Court did not decide or to decide the issue itself before a decision on the issue by the court of appeals is within the discretion of the Court.

In the event that the Court desires to decide the evidentiary foundation issue raised by the Government, the petitioner would point to the following facts which show that there was an evidentiary foundation for the instruction on good faith reliance on the advice of counsel. The principle defense of the petitioner was his reliance on the advice of counsel. He presented evidence on the issue of advice of counsel without any objection from the Government to the admission of the evidence. The Government also presented evidence on the issue of advice of counsel. Both the attorney Brown and the defendant were questioned by both the defense and by the Government attorneys on the issue of advice of counsel. There was no objection to any of the testimony. It was a fully litigated issue.

Part II of the opinion of the court of appeals gave a fairly extensive recitation of some of the evidence on both sides of the issue. Pet. App. A-5, A-6. The statement of facts in the opinion also recited evidence on the issue. Pet. App. A-2, A-3. The defendant had previously requested the advice of the attorney Alfred Brown about other tax shelters and had paid for such advice. Attorney Brown and the attorneys in his office were in the business of rendering advice on income tax shelters. The defendant sought the advice of the attorney about another tax shelter, and was advised by the attorney that the SMFA tax shelter was "superior" to the one about which the defendant inquired. The attorney was the one who recommended the SMFA tax shelter to the defendant. On the attorney's advice, the defendant actually purchased the tax shelter himself and recommended the tax shelter to his clients. Attorney Brown or one of the attorneys in his office was always present at all of the closings of the tax shelter investments. The attorney advice in this case was much more substantial then in other cases raising the defense of good faith reliance on the advice of counsel.

The Government has argued in this case that the defendant did not pay a retainer for the attorney's advice. There is no such requirement in the law. The Government can argue to the jury that this is a fact to be considered in its decision, but it is not a

fact which prevents the giving of a proper advice of counsel instruction to the jury in order for the jury to make a proper decision.

The Government in the Brief of Opposition argues that the defendant should have known that although there was a recourse portion of the investment, the side letter agreement "effectively negated the investor's personal liability on the recourse portion of the notes." Brief In Opposition, p. 2. The letter provided a credit for unsold artwork to be applied against the recourse portion of the note. The brief in opposition states that "(t)he letter therefore made the planned deductions for the 'recourse' portion of the notes illegal since the investors were not actually at risk for that portion of the investment." The issue at trial was whether the defendant believed that the recourse portion was not "actually" a recourse portion because of the effect of the credit provided by the letter, and therefore, that the deductions were illegal. The advice of the attorneys who were in the business of reviewing tax shelters was critical on this issue.

It was not even the defendant's idea to invest in the tax shelter. It was the attorney's idea in the first place. The attorney recommended the tax shelter as superior to the one about which the defendant inquired. Attorneys from that office were always present at the closings of the tax shelters. The defendant believed in the tax shelter so much that he invested in it himself after it was recommended by the attorney.

The Government points to two pieces of evidence in its argument that the defendant knew that the tax shelters were illegal. First, it points to the evidence that the defendant was a financial advisor. Secondly, it points to the evidence that at the closings the investors were informed not to show the IRS the side letter because the tax shelter "might be in question." Pet. App. A-3. There are deductions which "might be in question" in any IRS audit. In fact, it is not unusual in any IRS audit that deductions "might be in question." The Government is permitted to argue to the jury that such evidence shows knowledge of

criminality on the part of the defendant, but the jury must be properly instructed in order for the jury to make that decision. That the defendant may rely in good faith on the advice of counsel is an important instruction on this issue. The instruction informs the jury that it is proper to consider such evidence in making their decision, and the instruction sets forth the elements of the defense of good faith reliance on the advice of counsel.

The district court recognized that it was a legitimate issue and allowed the defense to argue the issue to the jury. The court of appeals' decision adamantly stated in footnote 1 that "there is no doubt that Kelley's defense theory was presented to the jury." Pet. App. A-6. When a defense theory is presented to a jury, the jury must be instructed on the issue, or the jury can conclude that the attorney is arguing something that has no basis in the law. An argument by an attorney without any instruction from the Court as to the law is "an aggravation rather than a mitigation of the harmful effect of the Court's refusal to instruct." *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir. 1988), quoting *United States v. Phillips*, 217 F.2d 435, 440 (7th Cir. 1954).

The Government in footnote 3 of its brief in opposition also argues that any error was harmless because the "knowingly" and "willfully" instructions "did not allow the jury to convict petitioner if it concluded that he had reasonably relied on the advice of counsel." Brief in Opposition, p. 6. That argument cites no authority. That argument is contrary to the decisions which state that the failure to instruct on the good faith reliance on the advice of counsel is an aggravation rather than a mitigation of the harmful effect. *United States v. Duncan*, *supra*; *United States v. Phillips*, *supra*. The Government argued that good faith reliance on advice of counsel was not a defense in this case. When the trial court agreed with the Government request not to instruct on the law on this primary defense, the court added support to the Government argument before the jury that good faith reliance on advice of counsel is not a

defense in this case.

The argument that the failure to instruct was harmless because general willfulness instructions were given is also contrary to the decisions of this Court that general willfulness instructions do not render harmless the failure to instruct on a valid defense theory. *United Brotherhood of Carpenters and Joiners of America v. United States*, *supra*; *Bird v. United States*, *supra*. The lack of any instruction on the defense of good faith reliance on the advice of counsel can indicate to the jury that there is no basis in the law for such a defense. The failure to give an instruction on good faith reliance on the advice of counsel also leaves it to the jury to make up its own elements of such a defense, which may be greater than or different than the elements of the law.

The argument that the failure to instruct was harmless because general willfulness instructions were given is also contrary to the additional erroneous instruction which was given allowing the jury to find that the defendant acted knowingly if the defendant had a "strong suspicion" and closed his eyes. Such instruction is in error when it does not require a "deliberate" or "willful" shutting of the eyes and an absence of actual belief in the legality of the actions. *United States v. Lanza*, 790 F.2d 1015 (2nd Cir.), *cert. denied*, 479 U.S. 861 (1986); *United States v. Arbizo*, 833 F.2d 244 (10th Cir. 1987); *United States v. C no*, 702 F.2d 370 (2nd Cir. 1985); *United States v. Jewell*, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

There is no harm in properly instructing a jury. There is great harm in failing to give an admittedly proper instruction to a jury on the primary defense in the case. The petition must be granted in order to correct the improper statement of the law set forth in the opinion of the court of appeals and to give the jury deciding the issue a proper instruction of the law. Only then can the issue be properly decided by the jury.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. The court should hold that form instructions on willfulness do not necessarily encompass an instruction on good faith reliance on advice of counsel. The decision of the court of appeals should be reversed and the case remanded to the court of appeals.

Respectfully submitted,

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